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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

84-1227 (3)

STATE OF CALIFORNIA,

Petitioner,

v.

MARCELINO RAMOS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of California

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1227

STATE OF CALIFORNIA, Petitioner, v. MARCELINO RAMOS, Respondent.	RESPONDENT'S BRIEF IN OPPOSITION

PREFACE:

The State of California has petitioned for a writ of certiorari based upon three grounds. As will be seen below, the first and third grounds do not even present a federal question. The second ground has already been the subject of a Petition for Certiorari by the State of California which has most recently been denied. California v. Garcia, No. 84-949, cert. den., February 19, 1985.

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ARGUMENT

I.

THE CALIFORNIA SUPREME COURT'S REVERSAL OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE PRESENTS NO FEDERAL QUESTION.

Petitioner first complains because the California Supreme Court applied its own opinions in Carlos v. Superior Court (1984) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 682] and People v. Garcia (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826] on remand.

No federal question arises when a State Supreme Court applies its own intervening state law decisions to a case pending on appeal.

All the California Supreme Court did in this case was to refuse to apply the state's "law of the case doctrine"[1/] --a doctrine wholly grounded in state law [2/]-- to preclude application of newly decided capital decisions.

On January 25, 1982, the California Supreme Court decided Ramos I. People v. Ramos (1982) 30 Cal.3d 553 [180 Cal.Rptr. 266, 639 P.2d 908].

On July 6, 1983, this Court reversed and remanded Ramos I. California v. Ramos __U.S.__, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983).

On December 12, 1983, the California Supreme Court

1/ Indeed, California's "law of the case doctrine" applies only to issues of law, not to issues of fact (Selby Construction v. McCarthy (1979) 91 Cal.App.3d 517, 522 [154 Cal.Rptr. 104]. Moreover, before the issue arises as to whether or not the doctrine applies, it must be found that the point of law was necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision. People v. Shuey (1975) 13 Cal.3d 835, 842 [120 Cal.Rptr. 83, 533 P.2d 24]; People v. Medina (1972) 6 Cal.3d 484, 491, fn. 7 [99 Cal.Rptr. 630, 492 P.2d 686].

2/ California's "law of the case doctrine" rests neither in whole nor in part on Federal Constitutional provision, statute, case law, or policy grounds. Rather, the doctrine has been adopted by California courts as an aid to the management of state court dockets and procedures. It is one of California's "fundamental rules of appellate procedure" (People v. Shuey, supra, 13 Cal.3d at 841) adopted "for reasons of policy and convenience." United Dredging Co. v. Industrial Acc. Com. (1930) 208 Cal. 705, 712. [284 P. 922]. California decisions clearly "treat the doctrine as merely one of policy . . ." 6 Witkin, California Procedure, (2nd Ed., 1971), 636, p. 4555.

decided People v. Garcia, supra.

On November 1, 1984, the California Supreme Court decided Ramos II. People v. Ramos (1984) 37 Cal.3d 136 [__ Cal.Rptr.__, __ P.2d__]; see Appendices to Petition, A-2 to A-72.

The California Supreme Court did not decide Ramos II because the People sought certiorari in Ramos I, and no such claim is made in the pending petition for certiorari. The People have already had their day in court on the Carlos/Garcia [3/] issue.

As the California Supreme Court held in, Ramos II, in rejecting the People's argument regarding the "law of the case," an exception to that doctrine applies to cases where the controlling rules of law have been altered or clarified by a decision intervening between the first and second determinations. "Carlos is, of course, just such a clarifying intervening decision." (Ibid., 37 Cal.3d at 146; Appendices To Petition, A-15).

It is equally clear that the decision in Ramos II to apply Garcia retroactively raises no federal question as California has adopted its retroactivity standards without reliance upon any Federal Constitutional provision, statute, case or policy. See People v. Garcia, supra, 36 Cal.3d at 548-549; In re Johnson (1970) 3 Cal.3d 404, 410 [90 Cal.Rptr. 569, 475 P.2d 841]; Donaldson v. Superior Court (1983) 35 Cal.3d 24 [196 Cal.Rptr. 704, 672 P.2d 110].

It is axiomatic that California has the right to manage its own docket, and to determine its own state law questions of "law of the case" and retroactivity. Thus, no federal question is presented to this Corut by argument I of the Petition.

3/ The People's Petition for Certiorari in People v. Garcia, supra, has recently been denied. See California v. Garcia, No. 84-949, cert. den., February 19, 1985.

II.

THE HARMLESS ERROR TEST ESPOUSED IN PEOPLE V. GARCIA IS CORRECT.

The State of California urges that, "Certiorari also should be granted so that People v. Garcia, supra, 36 Cal.3d 539, can be re-evaluated. This matter is already before this Court in California v. Garcia (cert. pending)." (Petition, at 33).

Garcia v. California is no longer pending. On February 19, 1985, cert. was denied. Therefore, this issue has already been rejected, very recently, by this Court, and for good reason. This response draws to a large extent on the one filed in Garcia with some adaptations to the instant case.

California has, consistent with its own authority, defined the statutory elements of a "special circumstance" (capital) first degree murder (see California Penal Code, § 192.2, subd.(a)(17)) so as to include an intent-to-kill requirement before defendant can be subjected to the alternative punishment of death or life without possibility of parole Carlos v. Superior Court (1983) 35 Cal.3d 131, 151-154 (197 Cal. Rptr. 79, 672 P.2d 862].[4/]

Thus, while the felony-murder rule remains a viable theory of first degree murder under existing California law (California Penal Code, § 187, 189; People v. Dillon (1982) 34 Cal.3d 441 [194 Cal.Rptr. 390, 668 P.2d 297]), California requires proof of an additional element, i.e. intent-to-kill, before that felony-murder becomes a capital murder. Carlos v. Superior Court, supra, at 153-154.

California, consistent with its authority and duty to define those crimes and criminals for which capital punishment may be appropriate (Gregg v. Georgia (1976) 428 U.S. 153, 186; Zant v. Stephens (1983) __ U.S. __ [77 L.Ed.2d 235, 250-251, fns. 15 and 17]), treats the special circumstances as

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4 / Non-capital murder of the first degree is punishable in California by imprisonment for an indeterminant term of 25 years to life. California Penal Code, § 190-190.1.

though they were elements of a criminal offense (People v. Garcia (1984) 36 Cal.3d 539, 551-552 [205 Cal.Rptr. 265, 684 P.2d 826].

The California Supreme Court's decision in Carlos, supra, confirmed a substantive definition of a criminal offense duly promulgated by state enactment. People v. Garcia, 36 Cal.3d at 549). Garcia merely applied that definition to ensure that defendants who do not intend-to-kill are not subjected to the potential alternative punishment of death or life imprisonment without possibility of parole under California's special circumstance statutory scheme. In the instant case, the California Supreme Court merely applied its two own decisions, Carlos and Garcia, and found that since there was no finding of intent to kill, a retrial on the finding of special circumstances was necessitated.

Nevertheless, California herein argues, as it did in the recently denied California v. Garcia, supra, that an inappropriate test of prejudice has been developed by California. This issue was previously presented in the recently denied California v. Garcia, supra. California's position flies in the face of this Court's previous decisions.

Every defendant has due process rights to a jury trial in which the state bears the burden of proving beyond a reasonable doubt each fact necessary to constitute the crime charged. United States Constitution, Sixth and Fourteenth Amendments; Duncan v. Louisiana (1967) 391 U.S. 145, 149-150; In re Winship (1970) 397 U.S. 358, 364. Withdrawing a critical element of the charge from the fact finder's determination by failing (in the instant case, refusing, infra) to deliver

instructions on it violates constitutional guarantees of due process, the right to a jury trial, the right to a fair trial, and conflicts with the presumption of innocence. Connecticut v. Johnson (1983) __ U.S. __ [74 L.Ed.2d 823, 835; Morisett v. United States (1951) 342 U.S. 246, 275.

Petitioner attempts to argue, as petitioner did in Garcia, supra, that Sandstrom v. Montana, Connecticut v. Johnson, and Mullaney v. Wilbur (1975) 421 U.S. 684 dealt with presumptions based upon jury instructions that were given, and that the instant case is somehow distinguishable because the jury was not told intent could be presumed (Petition, 37-39).

That reasoning if flawed. We have already shown that California treats its special circumstances defining California Penal Code, § 190.2 subd.(a)(17) as though they are elements of an offense for all practical due process purposes. (See Ramos v. Superior Court (1982) 32 Cal.3d 26, 32-33 [184 Cal.Rptr. 622, 648 P.2d 589]; People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 803 [183 Cal.Rptr. 800 647 P.2d 76]; People v. Green (1980) 27 Cal.3d 1, 62 [164 Cal.Rptr. 1, 609 P.2d 468]; Ghent v. Superior Court (1979) 90 Cal.App.3d 944, 952-955, and fns. 9-10 [153 Cal.Rptr. 720]). The trial on the determination of the special circumstance allegations is not only conducted at the same time as are the issues of guilt and innocence (California Penal Code, § 190.1), under California law they have all "the hallmarks of the trial on guilt or innocence." Bullington v. Missouri (1981) 451 U.S. 430, 439-441, 444-446; (emphasis added).

Thus, the foundation of petitioner's challenge to the application of fundamental due process principles to special circumstance determination is fatally flawed.

Additionally, the type of per se rule adopted by the California Supreme Court is totally consistent with this Court's own precedent. Garcia simply held that where an

element of the special circumstance allegation is totally withdrawn from the jury's determination by failing to deliver any instructions thereon and where an appellate court cannot determine, from the verdict forms returned in light of the instructions actually given, that the jury necessarily resolved that critical element against the accused, any finding by that jury on that special circumstance allegation is per se unreliable. People v. Garcia, supra, 36 Cal.3d 539, 556.[5/] Even this portion of the Garcia decision is predicated in substantial part on California law[6/].

In Connecticut v. Johnson, supra, a 4-member plurality of this Court held that a presumption which permits a jury to convict without ever examining the evidence concerning an element of the offense charged deprives the defendant of "'constitutional rights so basic to a fair trial that their infractions can never be treated as harmless error.'" (74 L.Ed.2d at p. 835; emphasis added). If the jury may have failed to consider evidence of intent, "a review in court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant." (Id., at pp. 833-834; emphasis added).

Four dissenting justices took issue with the

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5 / See Connecticut v. Johnson, supra, 74 L.Ed.2d 823, 835 (See also dissent opn. of Mr. Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor at pp. 840 and 841, fn. 3; Sandstrom v. Montana (1979) 422 U.S. 510, 520; Presnell v. Georgia (1979) 438 U.S. 14, 16; In re Winship (1970) 397 U.S. 358, 364; Duncan v. Louisiana (1967) 391 U.S. 145, 149-150; Speiser v. Randell (1958) 357 U.S. 513, 526; Carpenters and Joiners of America v. United States (1946) 330 U.S. 395, 408; Bollenbach v. United States (1946) 326 U.S. 607, 613-615.

6 / See Garcia's discussion of People v. Cantrell (1973) 8 Cal.3d 672 and People v. Thornton (1974) 11 Cal.3d 738 and People v. Sedeno (1974) 10 Cal.3d at 703 (Garcia, supra, 36 Cal.3d at 554).

plurality's conclusion that Johnson was necessarily denied a jury determination on the issue of intent so as to entitle him to automatic reversal (Id., at p. 840; opn. of Mr. Justice Powell). Rather, the dissent viewed the Sandstrom-type presumption instructions as not operating independently of the evidence. "The jury must look to the evidence initially to see if basic facts have been proved before it can consider whether it is appropriate to apply the presumption." (Ibid.; emphasis added). The dissenters opined that "it was necessary for the jury to look to the facts and circumstances to determine what [Johnson] did -- i.e. to consider the character and quality of his acts -- before it could define the natural and necessary consequences of those acts. If, however, the basic facts are themselves depositive of intent, the presumption becomes unnecessary to the jury's task of finding intent. Because the presumption does not remove the issue of intent from the jury's consideration, it does not preclude a reviewing court from determining whether the error was 'harmless beyond a reasonable doubt." (Citations)." (Id., at pp. 840-841; emphasis added).

The dissenters made clear, however, that had Johnson involved the situation which "remove[d] the issue of intent from the jury's consideration", thereby permitting the "'jury to convict without ever examining the evidence concerning an element of the crimes charged,'" (74 L.Ed.2d at p. 840 and fn. 3, 841), a reviewing court would have been precluded from applying a Chapman[7/] test of prejudice, and automatic reversal would have been required. (Ibid.; see also Jackson v. Virginia (1979) 443 U.S. 307, 320, fn. 14; Bollenbach v. United States, supra, 326 U.S. 607, 610-615.

Thus, both the plurality and dissenting opinions in Johnson agree that a conviction is fundamentally flawed

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7/ Chapman v. California (1967) 386 U.S. 18.

flawed when obtained through a process which instructs the fact-finder to return a guilty verdict without examining the evidence concerning a necessary element of the charge.

The instructional error at issue in the case at bench, where felony murder special circumstances have been found true without a corresponding finding of intent to kill, is more acute than the errors addressed in Sandstrom, supra, and Connecticut. Respondent's jury was never even told that intent-to-kill was a necessary element of the special allegation. They were simply instructed that if the defendant participated in one of the listed felonies and someone was killed during its commission,[8/] this special circumstance allegation was established as a matter of law, and the existence of an intent-to-kill was totally irrelevant.

Indeed, in the instant case respondent requested and instruction on intent-to-kill during the guilt phase, and the instruction was refused. As noted in the opinion (Appendice to Petition), the California Supreme Court has clearly held that based upon the facts and evidence presented in the case, this is not a case where necessary intent was established as a matter of law, as contrary evidence worthy of consideration was presented in the penalty phase (Appendice to Petition, A-22 to A-25). This factual finding by the California Supreme Court must be accorded a presumption of correctness. Sumner v. Mata (1982) 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480.

Moreover, the prejudice in the instant case is overwhelming where a charge was felony-murder (intent-to-kill clearly not required under California law), and where the prosecutor repeatedly argued for conviction based upon the felony murder doctrine.

Thus, respondent was truly convicted "of a charge on which [he was] never tried." (Presnell v. Georgia, supra,

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8/ See California Penal Code, § 190.2, subd.(a)(17)(i-viii).

439 U.S. 14, 16). The test was appropriately determiend by the California Supreme Court and appropriately applied in this case.[9/]

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III.

THE USE OF THE DOCTRINE OF INDEPENDENT STATE GROUNDS WAS CLEARLY APPROPRIATE IN THIS CASE.

The final argument in the Petition for Certiorari is frivolous. In California v. Ramos, supra, this Court explicitly left it open for the California Supreme Court to address the question of whether the commutation instruction compelled by California Penal Code, § 190.2 "independently violates any provisions of the State Constitution." (Id., 103 S.Ct. at 3541, n. 7). On remand the California Supreme Court did nothing more than follow this Court's invitation. The California Supreme Court first noted that while this Court had "upheld the [Briggs] instruction against defendant's federal constitutional challenge, the court made clear that the validity of the Briggs Instruction under the California Constitution remained to be decided by this court on remand (__ U.S.__ at p.___ [77 L.Ed.21 at p. 1178, 103 S.Ct. at p. 3541, fn. 7].)" People v. Ramos, 37 Cal.3d at 151; Appendices to Petition for Certiorari, at A-35; emphasis in original).

In its Opinion, the California Supreme Court expressly and frequently alluded to its authority and responsibility to construe the California Constitution independently from the United States Constitution (see, e.g., People v. Ramos, 37 Cal.3d at 143, 151, 152-153; Appendices to Petition for Certiorari at A-4, A-35, A-37-38).

The decision of a state court to afford its citizens greater protection under the state's constitution than this Court believes to be required by the federal constitution presents no federal question. Prune Yard Shopping Center v. Robins (1980) 447 U.S. 74, 81.

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CONCLUSION

It is thus submitted that the Petition for Certiorari ought to be denied.

DATED: APRIL 16, 1985

Respectfully submitted,

BUSHNELL, CAPLAN & FIELDING

BY: Alan M. Caplan
ALAN M. CAPLAN, ESQ.
Attorneys for Respondents

AFFIDAVIT OF SERVICE BY MAIL

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PEOPLE OF THE STATE OF CALIFORNIA,)
)
Petitioner,)
)
v.)
)
MARCELINO RAMOS,)
)
Respondent.)

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, employed in the City & County of San Francisco, in which City & County the within mentioned mailings occurred, and not a party to the subjected cause, my business address being 680 Beach Street, Suite 372, San Francisco, CA 94109.

I served the within RESPONDENT'S BRIEF IN OPPOSITION to the California Supreme Court as follows: An original and 3 copies on the United States Supreme Court, Alexander L. Stevas, Clerk, United States Supreme Court, Washington, DC 20543, of which a true and correct copy of the document filed in the cause as affixed by placing one copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectfully as follows:

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For delivery to: Honorable R.J. Beacom, Jr., Judge

Each envelope was then sealed and with postage prepaid, deposited in the United States mail by me at San Francisco, CA on April 18, 1985.

There is a delivery service by United States mail at each place so addressed or regular communication by United States mail between the place of mailing and each mailed so addressed.

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed at San Francisco, CA on April 18, 1985.

Alan M. Caplan
ALAN M. CAPLAN, ESQ.

Barbara Brever
NOTARY PUBLIC

My commission expires:

OFFICIAL SEAL
BARBARA BREVER
NOTARY PUBLIC CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Comm. Expires Dec 16 1988